Pump the Brakes: The Clean Water Act Does Not Cover Hydrologically Connected Groundwater [*Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018); *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018)]

Jesse T. Nation

The Supreme Court will favor an interpretation of the Clean Water Act ("CWA") that does not include hydrologically connected groundwater as a point source. Placing groundwater within the jurisdiction of the CWA would violate textualism's pump the brakes doctrine—environmental laws should not be interpreted in ways that exponentially increase jurisdiction of the act and displace the current regulatory schemes.

I. INTRODUCTION

Under a textualist reading of the Clean Water Act ("CWA"), hydrologically connected groundwater cannot be regulated as a point source by the CWA because hydrologically connected groundwater is not within the jurisdiction of the CWA. While textualism may be a controversial method of interpretation, its use is probably dispositive when predicting how the Supreme Court will resolve a circuit split.[1] Textualism demands that judges and attorneys interpret a statute's text by using the act's surrounding context.[2] From a textualist perspective, hydrologically connected groundwater is not covered by the CWA because the CWA regulates pollutant discharges directly from point sources.[3] The text of the act does not reach this conclusion alone, but

1. Richard L. Hasen, *Liberals Must Embrace a Bankrupt Judicial Philosophy to Have Any Chance of Winning at the Supreme Court*, SLATE (Oct. 18, 2018), https://slate.com/news-and-politics/2018/10/originalism-textualism-supreme-court-liberal-strategy.html [https://perma.cc/QK82-SGAR].

2. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 451–52 (Tex. 2011) (Willet, J., concurring).

3. 33 U.S.C. § 1362(14) (2012) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.").

statutory interpretation does not happen in a vacuum.[4] When the CWA is interpreted with textualist context, it becomes clear—the CWA does not consider hydrologically connected groundwater a point source. Defining hydrologically connected groundwater as a point source would violate the Supreme Court's established doctrine, that this Comment will call the "pump the brakes" doctrine, because environmental laws should not be interpreted in ways that exponentially increase the jurisdiction of the act and displace the current regulatory schemes.[5]

II. BACKGROUND

A. CWA Text

CWA jurisdiction is triggered by: a discharge of a pollutant from a point source into a water of the United States.[6] Any discharge of a pollutant from a point source into a water of the United States is prohibited.[7] These discharges may be lawful if the individual discharging has a National Pollutant Discharge Elimination System ("NPDES") permit.[8] An NPDES permit must comply with effluent limitations set by the Environmental Protection Agency ("EPA").[9] Effluent limitations are limits on pollutants that may be discharged from a point source.[10]

The CWA was passed to restore the biological integrity of the waters of the United States so they could become fishable and swimmable.[11] Although Congress had massive ambition for the CWA, Congress chose "to focus on polluters (through the point-source requirement), rather than pollution."[12] The CWA's predecessors focused on pollution and were unenforceable because tracing pollution to polluters was "impossible—only one prosecution was levied under that regime."[13] To

4. Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 352 (Tex. 2017).

5. *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 319 (2014).

6. Haw. Wildlife Fund v. Cty. of Maui, 886 F.3d 737, 744 (9th Cir. 2018). "[A] party violates the CWA when it does not obtain such a permit and '(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source.'" *Id.* (quoting Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001)).

7. *Id.* This Comment does not take a position on whether groundwater can be a water of the United States.

8. *Maui*, 886 F.3d at 744; Ohio Valley Envtl. Coal. v. Fola Coal Co., 845 F.3d 133, 142 (4th Cir. 2017).

9. *Maui*, 886 F.3d at 744; Upper Blackstone Water Pollution Abatement Dist. v. EPA, 690 F.3d 9, 14 (1st Cir. 2012).

10. *Maui*, 886 F.3d at 744; *Blackstone*, 690 F.3d at 14.

11. 33 U.S.C. § 1251(a) (2012); Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 928 (6th Cir. 2018).

12. *Ky. Waterways*, 905 F.3d at 937.

13. *Id.* at 928.

remedy this problem, Congress decided to aim the CWA at the sources of pollution, the polluters (the point sources), instead of pollution.[14]

The CWA was not intended to displace state power on the subject of regulating water pollution.[15] Congress explicitly recognized the primacy of state power in eliminating water pollution.[16] Groundwater regulation is an example of this state deference. The CWA's regulation of groundwater was purposely limited to information gathering.[17] The EPA was commanded to gather information about groundwater and give individual states reports to use for each state's own purposes.[18] Congress left the groundwater problem to the states because of the complexity behind monitoring groundwater and because the states had already established means to regulate groundwater.[19]

B. Textualism

Textualism is a method of statutory interpretation where courts look to the original public meaning of a statute's words to determine the statute's meaning.[20] The late Justice Scalia was textualism's greatest champion, changing the way conservative justices, liberal justices, and (so-called liberal) law professors interpret the law.[21] If environmentalists want to win their case in front of a Post-Scalia Supreme Court, they will have to leverage textualist arguments.[22] Although textualism emphasizes the text of a statute, textualism demands context to prevent absurdity or incoherence.[23] A recent Texas Supreme Court case sums up the telos of textualism:

> As an interpretive method, textualism has a singular objective: ascertaining words' accepted contextual meaning when they were enacted. No concern with abstract (and thus manipulable) purposes. [Textualism has] [n]o concern with wished-for (and thus preference-imposing) consequences.

---

14. *Id.* at 937.
15. 33 U.S.C. § 1251(b).
16. *Id.*
17. *See* Exxon Corp. v. Train, 554 F.2d 1310, 1324 (5th Cir. 1977).
18. *Id.*
19. Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994); *Exxon*, 554 F.2d at 1324.
20. Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 352 (Tex. 2017); Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 451–52 (Tex. 2011) (Willett, J., concurring).
21. *Ojo*, 356 S.W.3d at 451–52 (Willett, J., concurring); Hasen *supra* note 1; Jennifer Rubin, *Scalia Changed How His Opponents Thought*, WASH. POST (Feb. 15, 2016), https://www.washingtonpost.com/blogs/right-turn/wp/2016/02/15/scalia-changed-how-his-opponents-thought/?utm_term=.6ca9b7ddd955 [https://perma.cc/X36B-MQQ7] ("[I]t is a rare figure who forces his opponents to start thinking as he does. Through the sheer force of his intellect and the persuasiveness of his writing, that is what Scalia accomplished.").
22. *See* Hasen *supra* note 1; Rubin *supra* note 21.
23. *Cadena*, 518 S.W.3d at 352.

> Just an unremitting focus on giving words their contextual meaning—*not literal and not liberal*, but commonsensible.[24]

C. The Split on Hydrologically Connected Groundwater

Currently there is a split between the Ninth and Sixth Circuits about whether hydrologically connected groundwater is covered by the CWA as a point source.[25] The Ninth Circuit claims hydrologically connected groundwater may impose CWA liability because point source pollutant discharge *does not need to be conveyed directly* from a point source into a water of the United States.[26] The Sixth Circuit claims hydrologically connected groundwater may not impose CWA liability because pollutant discharge *must be conveyed directly* from a point source into a water of the United States.[27]

III. CONTEXT

Although reasonable minds may disagree about the reading of the CWA, the context of the CWA provided by the surrounding statutory scheme makes it clear that hydrologically connected groundwater was never intended to be a CWA point source. The pump the brakes doctrine, as a starting point, presumes the narrower interpretation of a statute is correct if a broader interpretation would exponentially increase the jurisdiction of the act and displace the current regulatory schemes.[28] Interpreting CWA point sources to include hydrologically connected groundwater will not be adopted by the Supreme Court because such an interpretation would exponentially increase the jurisdiction of the CWA and displace water pollution's current regulatory schemes.[29]

A. Creation of the Pump the Brakes Doctrine

The pump the brakes doctrine is a starting point of statutory interpretation for environmental laws.[30] This doctrine presumes that the narrower interpretation of an environmental statute is correct if a broader interpretation would increase the jurisdiction of the underlying act and displace the existing regulatory schemes.[31] Justice Kavanaugh created the pump the brakes doctrine and Justice Thomas, Justice Alito,

---

24. *Id.* (emphasis added).
25. *Compare* Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925 (6th Cir. 2018), *with* Haw. Wildlife Fund v. Cty. of Maui, 886 F.3d 737 (9th Cir. 2018).
26. *Maui*, 886 F.3d at 745.
27. *Ky. Waterways*, 905 F.3d at 937–38.
28. *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 318–19 (2014).
29. *See id.*
30. *See id.*
31. *See id.*

and Justice Roberts have adopted it.[32] Justice Scalia championed this doctrine and Justice Gorsuch is Justice Scalia's ideological successor.[33]

The pump the brakes doctrine was used in *Utility Air Regulatory Group v. EPA*.[34] In *Utility Air*, Justice Scalia said the EPA was acting with "some cheek" when the EPA failed to use context to promulgate a reasonable interpretation of the term "air pollutant" under the Clean Air Act's ("CAA") context.[35] The context provided by the entire CAA and the CAA's different titles convinced a majority of the Court that the term "air pollutant" had different meanings under different titles of the CAA.[36]

Specifically, Justice Scalia distinguished the meaning of "air pollutant" between Title II, Title I and Title V of the CAA.[37] Under Title II, Justice Scalia held the term "air pollutant" could include greenhouse gases because such an interpretation would not exponentially increase the jurisdiction of Title II and would not displace air pollution's current regulatory scheme.[38] Conversely, Justice Scalia held the term "air pollutant" could not include greenhouse gases under Title I and Title V even though courts ordinarily assume identical terms used in different parts of the same act are presumed to have the same meaning.[39] This different conclusion was reached because Title II had a different title specific context than Title I and Title V.[40] If Title I and Title V's definition of "air pollutant" included greenhouse gases, the jurisdiction of these titles would be exponentially increased to such a point that air pollution's current regulatory scheme would be displaced.[41]

---

32. *Util. Air*, 573 U.S. at 317; Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *69–70 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting) (applying the pump the brakes doctrine to *Utility Air's* predecessor case).

33. Hasen, *supra* note 1.

34. 573 U.S. 302 (2014).

35. *Util. Air*, 573 U.S. at 317 ("It takes some cheek for EPA to insist that it cannot possibly give 'air pollutant' a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been precisely that for decades.").

36. *See id.*

37. *Id.* at 317–18.

38. *Id. at* 318–19 ("Title II would not compel EPA to regulate in any way that would be 'extreme,' 'counterintuitive,' or contrary to 'common sense.' At most, it would require EPA to take the modest step of adding greenhouse-gas standards to the roster of new-motor-vehicle emission regulations.") (internal citations omitted).

39. *Id.* at 319–20. The Court specifically said a statute's context could defeat the identical word presumption:

> One ordinarily assumes "that identical words used in different parts of the same act are intended to have the same meaning." In this respect (as in countless others), the Act is far from a *chef d'oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."

Id. (internal citations omitted).

40. *Id.*

41. *Util. Air*, 573 U.S. at 318–22. The Court's analysis is included below:

B. Including Hydrologically Connected Groundwater in the CWA Violates the Pump the Brakes Doctrine

Interpreting the CWA to include hydrologically connected groundwater would violate the pump the brakes doctrine because it would increase the jurisdiction of the CWA and displace water pollution's current federal *and state* regulatory schemes.[42]

Attaching CWA liability to groundwater point source pollution would increase the jurisdiction of the CWA in ways Congress did not *and could not* anticipate. Such an increase in federal jurisdiction is hard to imagine because it is impossible to measure the precise contours of groundwater as it moves beneath the surface.[43] This positions any number of persons at risk of CWA liability because their activity just so happened to occur over groundwater. Further, such an increase in jurisdiction places state and federal administrators in the impossible position of enforcing groundwater point source discharge.[44] Enforcement would be incredibly difficult considering administrators would have to trace pollution to polluters, in addition to mapping out the precise contours of groundwater.[45] This tracing problem created a defect that rendered the CWA's predecessors unenforceable.[46] Congress intended to eliminate the tracing problem by making CWA liability only attach to discharges from identifiable conveyances into the waters of the United States, which are often surface waters that can be navigated by a boat.[47]

Extending CWA jurisdiction to groundwater pollution would displace the current state and federal regulatory schemes. Omitting hydrologically connected groundwater from the CWA was not a mistake.[48] Congress knew of groundwater's effect on waters of the

---

> EPA stated that these results would be so "contrary to congressional intent," and would so "severely undermine what Congress sought to accomplish," that they necessitated as much as a 1,000–fold increase in the permitting thresholds set forth in the statute. Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100- and 250-tons-per-year levels set forth in the statute would be "incompatible" with "the substance of Congress' regulatory scheme."

Id. at 322 (internal citations omitted).

42. The broader interpretation violates both federal and state regulatory schemes rather than just the federal scheme.

43. Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 933 (6th Cir. 2018) (holding groundwater by its very nature eludes the possibility of being confined, discrete, and/or discernible because groundwater "seeps in all directions" while moving underground). Even in *Maui*, neither expert was able to map out the precise contours of the groundwater that transported pollutants from a point source into a water of the United States. Haw. Wildlife Fund v. Cty. of Maui, 886 F.3d 737, 743 (9th Cir. 2018).

44. *See* Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994); Exxon Corp. v. Train, 554 F.2d 1310, 1324 (5th Cir. 1977).

45. *See Oconomowoc Lake*, 24 F.3d at 965; *Exxon*, 554 F.2d at 1324.

46. *Ky. Waterways*, 905 F.3d at 928 ("Trouble was, tracing those excess levels back to a particular defendant's actions proved all but impossible—only one prosecution was levied under that regime.").

47. *See Oconomowoc Lake*, 24 F.3d at 965; *Exxon*, 554 F.2d at 1324.

48. *See Oconomowoc Lake*, 24 F.3d at 965; *Exxon*, 554 F.2d at 1324.

United States but chose to leave the regulation of groundwaters to the states because states already had their own regulations in place and because mapping groundwater is nearly impossible.[49] This is why the EPA's sole mission was an information gathering responsibility; the information the EPA gained was given to the states so the individual states could make their own decisions about regulating groundwater or waters that were polluted by groundwater.[50]

Attaching federal liability to groundwater pollution would be inconsistent with the CWA's 1987 amendments. In 1987, Congress amended the CWA to require states to implement a Nonpoint (source) Management Program, the CWA Nonpoint Program.[51] The purpose of this amendment was to identify waters of the United States that would not become fishable and swimmable under current CWA point source regulation.[52] The states were explicitly given the power to develop and implement their own Nonpoint Management Program.[53] The EPA's role was limited to assessing the state's program and partially funding the state's Nonpoint Management Program.[54] Although NPDES permits have to prospectively comply with a state's Nonpoint Management Program, the EPA does not have the power to "penalize nonpoint source polluters who fail to adopt" the state's Nonpoint Management Program.[55] If hydrologically connected groundwater becomes a regulated point source under the CWA, any state-designed CWA Nonpoint Program that regulates groundwater would become displaced.[56]

C. A Note on Policy

Environmentalists may believe the broader purposes and policy decisions behind the CWA should be enough to justify hydrologically connected groundwater point source liability. However, this view is not persuasive under a textualism paradigm. Textualists turn to a statue's purpose as a means of last resort and prioritize the text of a statute over

---

49. *See Oconomowoc Lake*, 24 F.3d at 965; *Exxon*, 554 F.2d at 1324.

50. *See Oconomowoc Lake*, 24 F.3d at 965; *Exxon*, 554 F.2d at 1324.

51. *See* 33 U.S.C. § 1329 (2012); Nat'l Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 588 (6th Cir. 1988); Cent. Sierra Envtl. Res. Ctr. v. Stanislaus Nat'l Forest, 304 F. Supp. 3d 916, 924 (E.D. Cal. 2018).

52. 33 U.S.C. § 1329; *Nat'l Wildlife*, 862 F.2d at 588; *Stanislaus Nat'l Forest*, 304 F. Supp. 3d at 924.

53. 33 U.S.C. § 1329; *Nat'l Wildlife*, 862 F.2d at 588; *Stanislaus Nat'l Forest*, 304 F. Supp. 3d at 924.

54. 33 U.S.C. § 1329; *Nat'l Wildlife*, 862 F.2d at 588; *Stanislaus Nat'l Forest*, 304 F. Supp. 3d at 924.

55. 33 U.S.C. § 1329; *Nat'l Wildlife*, 862 F.2d at 588; *Stanislaus Nat'l Forest*, 304 F. Supp. 3d at 924.

56. *See* 33 U.S.C. § 1329; *Nat'l Wildlife*, 862 F.2d at 588; *Stanislaus Nat'l Forest*, 304 F. Supp. 3d at 924.

a statute's purposes.[57] Textualists are concerned with "substituting the purpose of the statute for its text."[58] Environmentalists would be better served repackaging their public policy arguments as statutory context arguments. Here, however, the Supreme Court will prefer the narrower interpretation of the hydrologically connected groundwater problem because of the pump the brakes doctrine.[59]

The Supreme Court's interpretation of a statute does not depend on whether the policy behind the statute is politically desirable or rationally sound.[60] Courts must enforce a statute's limits.[61] A court's job is not to find a "reasonable interpretation, but to find the best interpretation."[62] Here, the best textualist interpretation calls for the exclusion of hydrologically connected groundwater from CWA point source liability. Although Congress had massive ambition for the CWA's impact on water pollution, Congress did "not pursue its stated goal 'at all costs.'"[63] Congress created a specific regulatory scheme that would be displaced by a broader interpretation of the CWA.[64]

IV. CONCLUSION

From a textualist perspective, hydrologically connected groundwater is not covered by the CWA as a point source. A majority of

---

57. Rapanos v. United States, 547 U.S. 715, 755–56 (2006) (plurality opinion) (relying on a statute's purpose is the "last resort of extravagant interpretation").

58. *Id.* at 755.

59. *See supra* Part III(b).

60. *See* Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 U.S. App. LEXIS 25997, at *69–70 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting). Justice Kavanaugh's opinion on how to reconcile the limits of the CAA and the broad implications of global warming policy is included below:

> The task of dealing with global warming is urgent and important. But as in so many cases, the question here is: Who Decides? The short answer is that Congress (with the President) sets the policy through statutes, agencies implement that policy within statutory limits, and courts in justiciable cases ensure that agencies stay within the statutory limits set by Congress. A court's assessment of an agency's compliance with statutory limits does not depend on whether the agency's policy is good or whether the agency's intentions are laudatory. Even when that is true, we must enforce the statutory limits.

Id. at *88.

61. *Id.* at *69–70.

62. Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 938 (6th Cir. 2018). "Our task is 'not merely [to find] a reasonable interpretation, but the best one.'" *Id.* (quoting United States v. Zabawa, 719 F.3d 555, 560 (6th Cir. 2013)).

63. *Id.* at 937 (quoting *Rapanos*, 547 U.S. at 752). The Sixth Circuit further elaborated on this point:

> Congress could have prohibited *all* unpermitted discharges of *all* pollutants to *all* waters. But it did not go so far. Instead, Congress chose to prohibit only the discharge of pollutants to "*navigable* waters from any *point source*." 33 U.S.C. § 1362(12)(A) (emphasis added). Thus, Congress did not pursue its stated goal "at all costs," because the CWA precludes federal regulation over non-navigable-water pollution and over nonpoint-source pollution. And the CWA's backdrop illustrates why Congress decided to develop this point-source framework.

Id.

64. *Id.*

the Supreme Court will apply the pump the brakes doctrine to resolve this dispute.[65] This means that the Supreme Court will favor the interpretation that excludes hydrologically connected groundwater from CWA point source liability. An inclusive interpretation of the CWA that includes hydrologically connected groundwater would increase the jurisdiction of the CWA and displace water pollution's current regulatory scheme. Placing groundwater within the jurisdiction of the CWA would violate the Court's established pump the brakes doctrine because environmental laws should not be interpreted in ways that exponentially increase the jurisdiction of the act and displace the current regulatory scheme.[66]

65. *See supra* Part III(a).
66. Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 319 (2014).